FILE COPY

SEP 11

IN THE

SUPREME COURT

OF THE

UNITED STATES

October Term, 1935.

Number 348.

CITY OF LINCOLN, NEBRASKA, AND STANDARD ACCIDENT INSURANCE COMPANY,
PETITIONERS,
V.
L. A. RICKETTS, AS TRUSTEE IN BANKRUPTCY OF LINCOLN TRUST COMPANY, BANKRUPT,
RESPONDENT.

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

KARL W. KINDLEBERGER,
DON W. STEWART,
A. A. WHITWORTH,
CHARLES B. PAINE,
Counsel for Petitioners.

WEKESSER-BRINKMAN CO., Law Briefs, Lincoln, Neb.

INDEX.

	Page
Summary of Argument	2
Argument	2
1. Right of Sovereign to Priority does Exist in Nebraska	2
2. Opinion of the Nebraska Supreme Court Commission is not Entitled to Consideration because of an Express Statutory Provision	3
3. Right to Priority has not been Waived	5
Conclusion	6

CASES CITED.

City of Denver v. Stenger, 295 Fed. 809 (C. C. A. 8)	2, 3, 4
Commonwealth of Pennsylvania v. Stocker, 70 Fed. (2d) 453, 454 (C. C. A. 3)	6
Fiman v. State of South Dakota, 29 Fed. (2d) 776 C. C. A. 8); Cert. denied, 279 U. S. 841	4
In re Jones, 151 Fed. 108, 110	6
In re P. J. Potter's Sons, 143 Fed. 407 (D. C. Ky.)	4
In re Worcester County, 102 Fed. 808, 813 (C. C. A. 1)	6
Lott v. Salsbury, 237 Fed. 191 (C. C. A. 4)	5
McIntosh v. Standard Oil Co., 121 Neb. 92, 236 N. W. 152	3, 4
Smith v. Mottley, 150 Fed. 266 (C. C. A. 6)	5
State of Oregon v. Ingram, 63 Fed. (2d) 417, 420 (C. C. A. 9); Cert. denied, 290 U. S. 630	6

STATUTES CITED.

Nebr. Comp. Stat. 1929, Sec. 27-224	3
Nebr. Comp. Stat. 1929, Sec. 49-101	2
Sec. 64b (7) Bankruptcy Act	5

IN THE

SUPREME COURT

OF THE

UNITED STATES

October Term, 1935.

Number 348.

CITY OF LINCOLN, NEBRASKA, AND STANDARD ACCIDENT INSURANCE COMPANY, PETITIONERS,

V.

L. A. RICKETTS, AS TRUSTEE IN BANKRUPTCY OF LINCOLN TRUST COMPANY, BANKRUPT, RESPONDENT.

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

KARL W. KINDLEBERGER,
DON W. STEWART,
A. A. WHITWORTH,
CHARLES B. PAINE,
Counsel for Petitioners.

The filing of this reply brief is necessary in order to correct certain statements made in respondent's brief.

I.

SUMMARY OF ARGUMENT.

1.

The right of a sovereign to priority in the payment of its claim exists in Nebraska.

2.

An opinion of the Nebraska Supreme Court Commission is not entitled to consideration because of an express statutory provision.

3.

The right to priority has not been waived.

II.

ARGUMENT.

1.

RIGHT OF SOVEREIGN TO PRIORITY DOES EXIST IN NEBRASKA.

Respondent states on page 10 of his brief that the right of a sovereign to priority "is not in force in the State of Nebraska". We challenge the correctness of this statement.

Section 49-101, C. S. of Nebr. 1929, quoted on page 14 of our original brief herein, adopts the common law of England as the law of Nebraska.

In *City of Denver* v. *Stenger*, 295 Fed. 809 (C. C. A. 8), it was held that under a Colorado statute in almost the same language a sovereign right of priority was adopted and that a city, as an agency of the state, acquired

such right of priority. In the present case the Circuit Court of Appeals did not disapprove of the rule announced in *Denver* v. *Stenger, supra,* but refused to apply it because of its holding that a municipal corporation was not entitled to the same priority given to other corporations by the Bankruptcy Act. It has been our contention at all times that the rule announced in *Denver* v. *Stenger, supra,* is controlling in this case and should have been applied. The fact that a Colorado state court subsequently placed a different construction on the Colorado statute would not change the rule announced by the Circuit Court of Appeals as applied to a similar Nebraska statute.

2.

OPINION OF THE NEBRASKA SUPREME COURT COMMISSION IS NOT ENTITLED TO CONSIDERATION BECAUSE OF AN EXPRESS STATUTORY PROVISION.

In support of the statement that the right of a sovereign to priority is not recognized in Nebraska respondent, on page 11, cites an unreported opinion of the Supreme Court Commission of Nebraska. This opinion is not support for respondent's statement for two reasons: In the first place, a decision by the Supreme Court Commission does not establish any precedent. Section 27-224, C. S. of Nebr. 1929, specifically provides with reference to such decisions:

> "Such proceedings shall not be published in the reports of the court or in any other reports, and shall establish no precedent and be authority only in that particular case."

In the very recent case of *McIntosh* v. *Standard Oil Co.*, 121 Neb. 92, 236 N. W. 152, the Supreme Court

of Nebraska refused to consider a Commissioner's opinion which had been cited to it and said:

> "As to the case of *Lincoln Drug Co.* v. *Davidson*, No. 24836, on which the defendant relies, it may be said that **this court can give no consideration whatever to the latter in the instant case. It is a commission opinion.**"

(1) The statement on page 11 of respondent's brief that "the decisions of the Commission * * * are usually considered as law of the state until such time as expressly overruled by the court itself" is unsupported by any authority and is directly contrary to the statutory provision quoted and the holding in *McIntosh* v. *Standard Oil Company, supra.*

Furthermore, we do not believe the construction placed on this opinion by respondent is correct. As a matter of fact, the opinion specifically says that the authorities cited to sustain the sovereign right of priority "are convincing." The Commissioner did not apply the rule because the Nebraska law provided a complete plan for winding up the affairs of the bank involved. This is exactly what was held in the case of *Fiman* v. *State of South Dakota*, 29 Fed. (2d) 776 (C. C. A. 8), certiorari denied, 279 U. S. 841. (2) Such laws do not contain a provision as the Bankruptcy Act does giving the same priority that existed under the laws of a state.

Respondent, on page 11 of his brief, quotes from the opinion in *Re P. J. Potter's Sons*, 143 Fed. 407 (D. C. Ky.), holding that priority must be evidenced by statutory provision or judicial rule. Of course, in our case a statutory rule is involved, namely, the statute of Nebraska making the common law a part of its law and therefore under *Denver* v. *Stenger*, 295 Fed. 809 (C. C.

A. 8), heretofore cited, the common law right of priority of a sovereign became a part of the Nebraska law. Respondent failed to call the court's attention to the fact that the case of P. J. Potter's Sons was reversed by the Circuit Court of Appeals and a priority allowed. See *Smith* v. *Mottley,* 150 Fed. 266 (C. C. A. 6).

3.

RIGHT TO PRIORITY HAS NOT BEEN WAIVED.

Respondent, on page 12, claims that priority has been waived by failure to assert it prior to adjudication in bankruptcy and at the bottom of page 4 states that the amended claim contains no allegation of a trust ex maleficio or for priority under Section 64b (7) of the Bankruptcy Act. The record does not disclose that respondent has heretofore raised any question of such a waiver although the right to priority as a sovereign and as a trust was asserted, considered and passed upon by the referee (R. 22, 26), the District Court (R. 39; 43) and the Circuit Court of Appeals (R. 114, 122). Under such circumstances the question of a waiver could not be properly raised in this court. But even if it were considered it is without merit.

None of the authorities cited by respondent support his statement that the right to priority under Section 64b of the Bankruptcy Act is lost if not asserted before bankruptcy. Obviously such a rule would be unjust, harsh and impractical and would frequently deprive a creditor of priority given by the Bankruptcy Act. See *Lott* v. *Salsbury,* 237 Fed. 191 (C. C. A. 4).

As a matter of fact the right to priority need not be asserted until the trustee is ready to pay dividends to creditors. See

In re Worcester County, 102 Fed. 808, 813 (C. C. A. 1).

In re Jones, 151 Fed. 108, 110.

In the recent case of *State of Oregon* v. *Ingram,* 63 Fed. (2d) 417, 420 (C. C. A. 9), certiorari denied, 290 U. S. 630, the court specifically passed upon this question and held that the right of a sovereign to priority was not waived because not asserted until after bankruptcy. See also:

Commonwealth of Pennsylvania v. *Stocker,* 70 Fed. (2d) 453, 454 (C. C. A. 3).

CONCLUSION.

We respectfully submit that a writ of certiorari should be granted for the reasons stated in the petition therefor as amplified by petitioners' briefs.

Respectfully submitted,

KARL W. KINDLEBERGER,
DON W. STEWART,
A. A. WHITWORTH,
CHARLES B. PAINE,
Counsel for Petitioners.

FILE COPY

Office Supreme Court
FILED
DEC 24 19
CHARLES ELMORE

IN THE

SUPREME COURT

OF THE

UNITED STATES

October Term, 1935.

Number 348.

CITY OF LINCOLN, NEBRASKA, AND STANDARD ACCIDENT INSURANCE COMPANY, PETITIONERS,

V.

L. A. RICKETTS, AS TRUSTEE IN BANKRUPTCY OF LINCOLN TRUST COMPANY, BANKRUPT, RESPONDENT.

BRIEF FOR THE PETITIONERS.

KARL W. KINDLEBERGER,
DON W. STEWART,
A. A. WHITWORTH,
CHARLES B. PAINE,
Counsel for Petitioners.

WEKESSER-BRINKMAN CO., Law Briefs, Lincoln, Neb.

INDEX.

	Page
Opinions	1
Jurisdiction	2
Statement of the Case	2
Rulings of the Courts Below	3
Specification of Errors	4
Summary of Argument	5
Argument	5
Introduction	5
I. Section 64 (b) of the Bankruptcy Act giving priority to payment of debts entitled to priority under the laws of the States or of the United States applies to a municipal corporation, but was erroneously construed by the Circuit Court of Appeals to exclude such a corporation from any priority whatever	8
1. Circuit Court of Appeals misinterpreted case of Davis v. Pringle	9
2. Legislative intent should be considered in construing a statute	16
3. A reasonable construction should be given to a statute to effectuate the legislative intention	18
4. A statute should be construed to avoid unjust or absurd results	22
II. Section 64 (b) of the Bankruptcy Act applies and under it a municipal corporation is entitled to the common law right of priority accorded a sovereign which has been adopted by the statutes of Nebraska	25
1. Sovereign is entitled to priority in payment over general creditors	25
2. Common law right of a sovereign to priority has been adopted by statute of Nebraska	26
3. Right of sovereign to priority is recognized in bankruptcy proceedings	30
Conclusion	30

CASES CITED.

	Page
Aetna Casualty & Surety Co. v. Bramwell, 12 Fed. (2d) 307 (D. C. Ore.)	29
Almac Operating Corporation, 42 Fed. (2d) 120 (C. C. A. 2)	30
Barrett v. Van Pelt, 268 U. S. 85	16
Burnet v. Guggenheim, 288 U. S. 280, 286	22

INDEX—(Continued).

Page

City of Denver v. Stenger, 295 Fed. 809 (C. C. A. 8) ---- 22, 25, 26, 29, 31, 31

Davis v. Pringle, 268 U. S. 315 ---- 9, 10, 12, 13, 14, 16, 19
Detroit Street R. Co. v. Detroit, 64 Fed. 628, 645 (C. C. A. 6) ---- 14

Georgia Banking Co. v. Smith, 128 U. S. 174, 181 ---- 14

Harvard Law Review, Vol. 40, pages 345 and 346 ---- 14, 15
Helvering v. New York Trust Co., 292 U. S. 455 ---- 24

In re Hauger, 54 Fed. (2d) 117 (D. C. Tex.) ---- 13
In re Martin, 75 Fed. (2d) 618 ---- 30
In re Worcester County, 102 Fed. 808, 815 (1 C. C. A.) ---- 11, 22

Jordan v. Roche, 228 U. S. 436, 445, 446 ---- 13

Marshall v. New York, 254 U. S. 380, 382, 386 ---- 25, 31

Ohio v. Helvering, 292 U. S. 360, 370 ---- 14, 19, 21
Ozawa v. United States, 260 U. S. 178 ---- 18

Royal Indem. Co. v. American Bond & Mortgage Co., 289 U. S. 165, 169 ---- 19

State of Oregon v. Ingram, 63 Fed. (2d) 417 (C. C. A. 9) cert. den. 290 U. S. 630 ---- 30

Trenton v. New Jersey, 262 U. S. 182, 187 ---- 22, 29

U. S. v. Bank of N. C., 31 U. S. 29, 35 ---- 31
U. S. v. Ryan, 284 U. S. 167, 175 ---- 23

Wheeler v. Johnson, 26 Fed. (2d) 455 (C. C. A. 8) ---- 23
Worcester v. Worcester Co., 196 U. S. 539, 548 ---- 22, 29

STATUTES AND TEXTS.

Sec. 4a Bankruptcy Act, 11 U. S. C. A., Sec. 22 ---- 10
Sec. 4b Bankruptcy Act, 11 U. S. C. A., Sec. 22 ---- 10
Sec. 64 (a) Bankruptcy Act, 11 U. S. C. A., Sec. 104 ---- 11, 12
Sec. 64 (b) Bankruptcy Act, 11 U. S. C. A., Sec. 104b ----
2, 4, 5, 6, 8, 9, 11, 12, 13, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 30, 31, 32

Sec. 240 (a) Judicial Code Ch. 229, Sec. 1, 43 Stat. 938, 28 U. S. C. A., Sec. 347 ---- 2
Sec. 49-101, C. S. Neb. 1929 ---- 26
Sec. 6516, C. L. Colo. 1921 ---- 28

IN THE

SUPREME COURT

OF THE

UNITED STATES

October Term, 1935.

Number 348.

CITY OF LINCOLN, NEBRASKA, AND STANDARD ACCIDENT INSURANCE COMPANY, PETITIONERS,

V.

L. A. RICKETTS, AS TRUSTEE IN BANKRUPTCY OF LINCOLN TRUST COMPANY, BANKRUPT, RESPONDENT.

BRIEF FOR THE PETITIONERS.

KARL W. KINDLEBERGER,
DON W. STEWART,
A. A. WHITWORTH,
CHARLES B. PAINE,
Counsel for Petitioners.

OPINIONS.

The opinion of the Circuit Court of Appeals, Eighth Circuit, filed April 27, 1935, is reported in 77 Fed. (2d) 425, and is in the record (R. 116).

JURISDICTION.

The case is before the court upon a writ of certiorari granted on October 14, 1935, under Section 240 (a), Judicial Code, as amended by the Act of February 13, 1925 (C. 229, Sec. 1, 43 Stat. 938, 28 U. S. C. A., Sec. 347). The order granting certiorari was limited to the question of the application of Section 64 (b) of the Bankruptcy Act.

STATEMENT OF THE CASE.

This appeal involves the right to priority in the payment of a $45,509.00 claim of the City of Lincoln, Nebraska, against the Lincoln Trust Company, Bankrupt. Priority was denied by the Circuit Court of Appeals on the ground that a debt due a municipal corporation was not within the provisions of Section 64 (b), Subdivision (7) of the Bankruptcy Act allowing priority to debts owing any person who is entitled to priority by the law of any state (R. 116). The facts material to this appeal are not disputed.

Briefly summarized, the evidence shows that on September 26, 1928, the City of Lincoln, Nebraska, a municipal corporation, paid $45,000.00 to the Lincoln Trust Company, then engaged in a general trust company business, under the laws of Nebraska. The Trust Company upon receiving such money delivered to the City nine certificates for $5,000.00 each, the material parts of which are as follows (R. 68):

> "THIS IS TO CERTIFY that the LINCOLN TRUST COMPANY of Lincoln, Nebraska, holds for investment in Trust, funds belonging to City Treasurer of Lincoln, Nebraska, in the sum of Five Thou-

sand & no/100 Dollars ($5,000.00) with interest at 3 per cent per annum payable quarterly from date until returnable to owner on demand 19_____"

The Trust Company paid the City interest at 3 per cent up to March 26, 1932 (R. 69). On June 14, 1932, the City demanded the principal and accrued interest on the certificates, which was refused. On July 9, 1932, the Trust Company was adjudicated a bankrupt (R. 58).

The City filed a general claim for $45,509.00 which it subsequently amended to claim priority. After the question of priority was submitted to the Referee the petitioner, Standard Accident Insurance Company, as surety for the Trust Company, paid to the City the amount of its amended claim. The City's rights were then assigned to the insurance company, which was thereupon made a party to the proceedings (R. 58).

RULINGS OF THE COURTS BELOW.

On April 13, 1934, the Referee entered an order disallowing the claim of priority and directing that the claim should stand allowed as a general claim (R. 22).

Petition for review was filed and submitted to Hon. J. A. Donohoe, District Judge (R. 28). On October 8, 1934, a memorandum was filed by the District Judge in which he held that the claim was entitled to priority in the sum of $12,979.42 (R. 39).

On December 12, 1934, the District Judge, without notice, withdrew his memorandum of October 8th and filed a new memorandum allowing priority of only $628.63 (R. 40-57).

On December 17, 1934, judgment and decree was entered directing that the Referee's order disallowing priority be modified by allowing priority to the extent of $628.63 to be paid prior to the claim of general creditors and the balance to be allowed as a general claim (R. 59).

On April 27, 1935, the Circuit Court of Appeals modified the judgment of the District Court by disallowing any claim of priority (R. 114).

On May 25, 1935, a petition for rehearing was filed by petitioners (R. 125) which was denied on July 3, 1935 (R. 127).

SPECIFICATION OF ERRORS.

1. The Circuit Court of Appeals erroneously held that Section 64 (b) of the Bankruptcy Act did not apply to a municipal corporation and thus denied such a corporation even the same right of priority given to other corporations and persons.

2. The Circuit Court of Appeals erroneously held that Section 64 (b) of the Bankruptcy Act did not apply to a municipal corporation and thus denied such a corporation the common law right of priority accorded a sovereign which has been adopted by the statutes of Nebraska.

3. The Circuit Court of Appeals erroneously held no trust relation existed under the terms of a writing providing that a trust company "* * * holds for investment in trust, funds belonging to City * * *."

4. The Circuit Court of Appeals erroneously held that a trust ex maleficio did not result in favor of the City.

5. The Circuit Court of Appeals erroneously refused to follow the construction by the Supreme Court of Nebraska of the Nebraska Constitution and statute that trust funds may be recovered from an insolvent trustee upon proof that such funds augmented the assets in the hands of such trustee.

SUMMARY OF ARGUMENT.

1. Section 64 (b) of the Bankruptcy Act giving priority to payment of debts entitled to priority under the laws of the state or of the United States applies to a municipal corporation, but was erroneously construed by the Circuit Court of Appeals to exclude such a corporation from any priority whatever.

2. Section 64 (b) of the Bankruptcy Act applies and under it a municipal corporation is entitled to the common law right of priority accorded a sovereign which has been adopted by the statutes of Nebraska.

ARGUMENT.

Introduction.

Section 64 (b) of the Bankruptcy Act, as amended (44 Stat. 666, 11 U. S. C. A., Sec. 104 (b) provides:

> "The debts to have priority in advance of the payment of dividends to creditors and to be paid in full out of bankrupt estates and the order of payment shall be * * * (7) debts owing to any person who by the laws of the states or the United States is entitled to priority; provided, that the term 'person' as used in this section shall include corporations, the United States and the several states and territories of the United States."